

JAN 26 2009

TO: Mail Stop 8 Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK
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In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court of New Jersey on the following ☒ Patents or ☐ Trademarks:

DOCKET NO. <u>Civ 09-177 (JL)</u>	DATE FILED <u>1/13/09</u>	U.S. DISTRICT COURT <u>Dist of New Jersey (Newark)</u>
PLAINTIFF <u>EVERETT Laboratories, Inc</u>		DEFENDANT <u>BRECKENRIDGE Pharmaceuticals</u>
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 <u>Please see the attached Complaint + Exhibits</u>		
2 <u>6,814,983</u>		
3 <u>7,390,509</u>		
4 <u>6,660,293</u>		
5 <u>6,863,904</u>		

In the above—entitled case, the following patent(s)/trademark(s) have been included:

DATE INCLUDED	INCLUDED BY	<input type="checkbox"/> Amendment	<input type="checkbox"/> Answer	<input type="checkbox"/> Cross Bill	<input type="checkbox"/> Other Pleading
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK			
1					
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4					
5					

In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK <u>William T. Walsh</u>	(BY) DEPUTY CLERK <u>Charlie Sanders</u>	DATE <u>1/20/09</u>
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THIRD CLAIM FOR RELIEF

(Federal Unfair Competition)

42. Everett realleges and incorporates by reference paragraphs 1 through 41 as if fully set forth herein.

43. Defendant knowingly copied and used the formulations of Everett's established patented Strovite[®] Advance brand product for its use in advertising, marketing and offering for sale its identical lower cost Nutravance product in the United States.

44. Defendant's actions described above constitute unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

45. The acts of Defendant, and in particular the copying of the formulations for Everett's established patented Strovite[®] Advance brand product in order to market Defendant's lower cost Nutravance product and to directly compete with Everett, were done by Defendant with the intent to deprive Everett of its property and/or legal rights and/or otherwise to cause injury. Such an unconscionable and deceitful commercial practice justifies an award of punitive and exemplary damages against Defendant.

46. Defendant's misrepresentations concerning the nature, characteristics and/or qualities of its Nutravance product as equivalent to Everett's established Strovite[®] Advance brand product with the willful and calculated purposes of misleading, deceiving or confusing wholesale distributors, prescribing physicians, dispensing pharmacies and patients are likely to continue unless restrained and enjoined.

47. As a result of Defendant's misrepresentations concerning the nature, characteristics and/or qualities of its Nutravance low cost product in connection with its commercial advertising and promotion, Everett has suffered and will continue to suffer damages and losses including but not limited to, irreparable injury to its business reputation and goodwill.

48. Everett is entitled to injunctive relief and to an order compelling the impounding of all Nutravance products being used, advertised, marketed, offered for sale or distributed by Defendant. Everett has no adequate remedy at law for Defendant's wrongful conduct because, among other things, Everett's intellectual property is unique and valuable property which has no

readily-determinable market value; Defendant's use, advertising, marketing, offering for sale or distribution of its Nutravance product constitutes harm to Everett's business reputation and goodwill such that Everett could not be made whole by any monetary award; and Defendant's wrongful conduct, and the resulting damage to Everett, is continuing.

FOURTH CLAIM FOR RELIEF

(State Law Unfair Competition)

49. Everett realleges and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. This cause of action arises under the New Jersey Fair Trade Act, N.J.S.A. 56:4-1 *et seq.* (2001), and New Jersey common law.

51. Defendant, by reason of the foregoing wrongful acts, has engaged in unfair methods of competition and unfair and deceptive acts and practices in the conduct of its trade, which acts and practices have injured Everett within the meaning, and in violation of, the statutes and common law of the State of New Jersey.

52. The acts of Defendant, and in particular the copying of the formulations for Everett's established patented Strovite® Advance brand product in order to market Defendant's lower cost Nutravance product and to directly compete with Everett, were done by Defendant with the intent to deprive Everett of its property and/or legal rights and/or otherwise to cause injury. Such an unconscionable and deceitful commercial practice justifies an award of punitive and exemplary damages against Defendant.

53. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to Everett in that Defendant's engaging in unfair methods of competition and unfair and deceptive acts and practices has and will continue to harm Everett's goodwill and reputation for which there is no adequate monetary relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Everett Laboratories, Inc. asks that this Court enter judgment against Defendant, granting the following relief:

- A. Judgment that Defendant has directly infringed U.S. Patent No. 6,660,293.
- B. Judgment that Defendant has directly infringed U.S. Patent No. 6,863,904.
- C. Judgment that Defendant has indirectly infringed U.S. Patent No. 6,660,293 by inducing the direct infringement of the '293 Patent.
- D. Judgment that Defendant has indirectly infringed U.S. Patent No. 6,863,904 by inducing the direct infringement of the '904 Patent.
- E. Judgment that Defendant has indirectly infringed U.S. Patent No. 6,660,293 by contributing to the direct infringement of the '293 Patent.
- F. Judgment that Defendant has indirectly infringed U.S. Patent No. 6,863,904 by contributing to the direct infringement of the '904 Patent.
- G. That Defendant be held to have willfully engaged in unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).
- H. That Defendant be held to have engaged in unfair methods of competition and unfair and deceptive acts and practices in violation of N.J.S.A. 56:4-1 and the common law of the State of New Jersey.
- I. That a preliminary and permanent injunction issue prohibiting Defendant and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from further direct and/or indirect infringement of the '293 and '904 Patents.

J. That the Court enter an order requiring Defendant to:

1. deliver upon oath, to be impounded during the pendency of this action, and for destruction pursuant to judgment herein, all Nutravance products and/or any nutritional supplement that is identical or substantially similar to the patented Strovite® Advance formulations.

2. Place all revenues generated from the sale of Nutravance, as well as all future payments from the sale of Nutravance, in a trust account during the pendency of this action.

K. That Defendant be required to file with the Court and serve on Everett, within 30 days after service of the Court's Order as herein prayed, a report in writing under oath stating in detail the manner and form in which Defendant has complied with the Court's Order.

L. That Defendant be required to account for and pay over to Everett all profits obtained by Defendant from its acts of infringement and for its other violations of law complained of herein.

M. That the Court enter an order declaring that Defendant hold in trust, as constructive trustee for the benefit of Everett, the profits obtained from the distribution of infringing copies of Everett's vitamins, and requiring Defendant to provide Everett a complete accounting of all amounts due and owing to Everett as a result of Defendant's illegal activities.

N. That the Court order Defendant to pay Everett's general, special, actual and statutory damages including, but not limited to, a trebling of Everett's damages, pursuant to N.J.S.A. 56:4-2.

O. That Defendant pay Everett additional damages for willful infringement of the '293 and '904 Patents and other violations of law complained herein, in an amount to be determined at trial, pursuant to 35 U.S.C. § 284.

P. Judgment that this is an exceptional case under 35 U.S.C. § 285 and awarding Everett its costs, expenses and reasonable attorneys' fees incurred in this action.

Q. Such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38, Fed. R. Civ. P., Plaintiff Everett hereby demands a jury trial on all issues triable of right by a jury.

Respectfully submitted,

RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP
Attorneys for Plaintiff
Everett Laboratories, Inc.

By /s/ Robert J. Schoenberg
ROBERT J. SCHOENBERG

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Dated: January 13, 2009.

Of Counsel:
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CERTIFICATION OF NON-ARBITRABILITY

Pursuant to Local Civil Rule 201.1(d)(2), the undersigned attorneys for Plaintiff, Everett Laboratories, Inc., certify that this action is not eligible for arbitration under Local Civil Rule 201.1 because the relief sought in the Complaint primarily consists of a demand for preliminary and permanent injunctive relief, as well as damages believed to be in excess of \$150,000.00, exclusive of interest, costs, and any claim for punitive damages, and involves complex issues of patent law.

LOCAL CIVIL RULE 11.2 CERTIFICATION

Pursuant to L. Civ. R. 11.2, the undersigned attorney for Plaintiff, Everett Laboratories, Inc., certifies as follows: the dispute that is the subject of this Complaint is also the subject of an action filed by Defendant Breckenridge Pharmaceutical, Inc. styled *Breckenridge Pharmaceutical, Inc. v. Everett Laboratories, Inc.*, Case No. 09-80015-Civ-MARRA/JOHNSON (the "Florida Complaint"). In addition, as set forth above, Plaintiff believes that the dispute reflected in the instant Complaint directly relates to, and is a continuation of, the dispute between the parties that exists in the case pending before this Court styled *Everett Laboratories, Inc. v. Breckenridge Pharmaceutical, Inc.*, Civil Action No. 08-3156 (JLL), a portion of which is currently on appeal before the U.S. Court of Appeals for the Federal Circuit, No. 2008-1601. In addition, one of the patents-in-suit, the '983 Patent, was the subject of a similar action filed in this Court by Everett against River's Edge Pharmaceuticals, Inc., Civil Action No. 08-75 (KSH). That case was settled and dismissed in 2008.

RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP
Attorneys for Plaintiff
EVERETT LABORATORIES, INC.

By /s/ Robert J. Schoenberg
ROBERT J. SCHOENBERG

Dated: January 13, 2009

VERIFICATION OF COMPLAINT

I, John A. Giordano, of full age, hereby declare upon my oath, the following:

1. I am an executive Vice President of Everett Laboratories, Inc., plaintiff in the above-captioned lawsuit against defendant Breckenridge Pharmaceutical, Inc.
2. I have read the foregoing Verified Complaint and it is true to the best of my knowledge, except as to matters stated upon information and belief which I believe to be true.
3. I certify that the foregoing statements are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.


JOHN A. GIORDANO

Dated: January 13, 2009

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Attorneys for Plaintiff
Everett Laboratories, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EVERETT LABORATORIES, INC.,

Plaintiff,

v.

BRECKENRIDGE PHARMACEUTICAL,
INC.,

Defendant.

Civil Action No. _____

(Related to Civil Action No. 08-3156 (JLL))

Hon.

**VERIFIED COMPLAINT
AND JURY DEMAND**

Document Filed Electronically

Plaintiff Everett Laboratories, Inc. ("Everett"), by its undersigned attorneys, for its
Verified Complaint against Defendant Breckenridge Pharmaceutical, Inc. ("Breckenridge" or
"Defendant"), alleges as follows:

JURISDICTION AND VENUE

1. This Court has original and exclusive jurisdiction of this action, pursuant to 28 U.S.C. §§ 1331 and 1338(a), because the action arises under the Patent Laws of the United States, Title 35, United States Code. The Court also has original jurisdiction over the unfair competition claim stated herein, pursuant to 28 U.S.C. § 1338(b), because the claim arises under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

2. This Court also has jurisdiction under 28 U.S.C. § 1332(a)(1) because complete diversity of citizenship exists between the parties and the matter in controversy exceeds the sum

of \$75,000, exclusive of interest, costs and attorney's fees.

3. The Court has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over the state law claims pled herein.

4. The Court has personal jurisdiction over Defendant in this action because Defendant is a national company that maintains an office in Fairfield, New Jersey and otherwise regularly conducts business in New Jersey. Breckenridge is in the business of selling prescription products to retailers, wholesalers, distributors, and other purchasers of such products nationwide, including New Jersey. Moreover, on information and belief, Breckenridge has offered to sell, offers to sell, and will sell infringing products across the United States and/or indirectly causes others to infringe the patent contributorily or through inducement. Additionally, Defendant has consented to the jurisdiction of the state and federal courts in New Jersey by registering as a foreign corporation with the New Jersey Secretary of State and appointing a registered agent for service of process in this state.

5. This Complaint involves a patented prescription-only nutritional supplement marketed and sold by Plaintiff under the brand name "Strovite® Advance" which Defendant has improperly copied and attempted to market and sell under the name "Nutravance." In so doing, Defendant is, *inter alia*, violating Plaintiff's rights under its lawfully issued patents.

6. In several respects this dispute relates to, and is a continuation of, a very similar pending dispute between Plaintiff and Defendant concerning another prescription-only nutritional supplement product sold by Plaintiff ("VitafoI®-OB") which Defendant improperly copied and attempted to market and sell (under the name "Multifol Plus"). That dispute is currently the subject of the case *Everett Laboratories, Inc. v. Breckenridge Pharmaceutical, Inc.*, Civil Action No. 08-3156 (JLL) (the "VitafoI®-OB Case"), which is pending in this Court before the Honorable Jose L. Linares, U.S.D.J. In August 2008, Judge Linares entered an order

preliminarily enjoining Defendant from marketing and selling Multifol Plus based on Plaintiff's contention that Multifol Plus infringes Plaintiff's patent rights in U.S. Patent Nos. 6,814,983 and 7,390,509. Defendant has appealed the entry of the preliminary injunction and that case remains pending before the U.S. Court of Appeals for the Federal Circuit, *Breckenridge Pharmaceutical, Inc. v. Everett Laboratories, Inc.*, No. 2008-1601 (the "Federal Circuit Appeal"). In the Federal Circuit Appeal, Defendant contends that the patents for Vitafo[®]-OB are invalid as "obvious."

7. On January 8, 2009, the Office of Mediation for the Federal Circuit convened a mediation session in connection with the Federal Circuit Appeal. However, on the morning of the mediation Plaintiff learned that the prior day -- January 7, 2009 -- Breckenridge filed a complaint for declaratory judgment in the United States District Court for the Southern District of Florida, styled *Breckenridge Pharmaceutical, Inc. v. Everett Laboratories, Inc.*, Case No. 09-80015-Civ-MARRA/JOHNSON (the "Florida Complaint"). Breckenridge contends therein, among other things, that certain Everett patents relating to its Strovite[®] Advance product are invalid, *inter alia*, as obvious under 35 U.S.C. § 103.

8. Both the Vitafo[®]-OB Case (and the Federal Circuit Appeal) and the Florida Complaint (and this new case) all involve the same principal issue: whether Everett's patents for its prescription-only nutritional supplements are invalid as obvious under 35 U.S.C. § 103.

9. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and 1400(b) because Defendant's unlawful acts of infringement have occurred, and will continue to occur, in this judicial district and Defendant resides in this judicial district.

THE PARTIES

10. Everett is a corporation organized and existing under the laws of the State of New Jersey, having its headquarters and principal place of business at 29 Spring Street, West Orange, New Jersey.

11. On information and belief, Defendant is a corporation organized and existing under the laws of the state of Florida and/or Delaware, having its headquarters and principal place of business at 1141 South Rogers Circle, Suite 3, Boca Raton, Florida, 33487.

12. According to its website (www.bpirx.com), Defendant maintains an office at 1 Passaic Avenue, Fairfield, New Jersey, 07004, with several employees including a Vice President of Sales, a Director of National Accounts, a National Account Manager and a Director of Sales.

PLAINTIFF EVERETT LABORATORIES

13. Everett is a pharmaceutical company that has been and continues to market and sell various prescription-only nutritional supplement products throughout the United States. Everett's reputation has been and continues to be enviable both in the trade and to the general consuming public in the United States. Everett is well known to prescribers of Rx nutritional supplements and medicines as well as to retailers, wholesalers, physicians, pharmacists, patients and distributors in the industry in the United States.

14. Since December 18, 2002, Everett has continuously and actively engaged in selling a nutritional supplement called Strovite® Advance, which was formulated to provide the necessary vitamins, minerals, and other nutrients to individuals in physiologically stressful condition and to minimize the effect of exogenous iron supplementation. It contains specified quantities, or ranges of quantities, of vitamins E, D₃, C, folic acid, B₁, B₂, B₆, B₁₂, carotenoids, niacin; biotin, and pantothenic acid, and minerals magnesium, manganese, zinc, selenium, chromium, and copper, and other nutrients alpha lipoic acid and lutein. See Strovite® Advance product insert attached hereto as Exhibit A.

15. Everett has engaged in extensive advertising and promotion of Strovite® Advance to gain goodwill and public recognition of its product. To that end, Everett has spent substantial sums of money and resources to develop, advertise, and market Strovite® Advance.

16. On December 9, 2003, U.S. Patent No. 6,660,293, entitled "Compositions And Methods For Prophylactic and Therapeutic Supplementation of Nutrition in Subjects" ("the '293 Patent"), was duly and validly issued to the inventors John A. Giordano and Charles Balzer. A true and correct copy of U.S. Patent No. 6,660,293 is attached hereto as Exhibit B. Everett is the owner by assignment of the '293 Patent.

17. The '293 Patent is directed to compositions and methods for therapeutic nutritional supplementation of subjects in physiologically stressful states, including but not limited to individuals suffering from obesity, hypertension, heart failure, anorexia, alcoholism and other diseases. Claims of the '293 Patent cover Everett's Strovite[®] Advance prescription multivitamin product.

18. On March 8, 2005, U.S. Patent No. 6,863,904, entitled "Compositions And Methods For Prophylactic and Therapeutic Supplementation of Nutrition in Subjects" ("the '904 Patent"), was duly and validly issued to the inventors John A. Giordano and Charles Balzer. A true and correct copy of U.S. Patent No. 6,863,904 is attached hereto as Exhibit C. Everett is the owner by assignment of the '904 Patent.

19. The '904 Patent is directed to compositions and methods for nutritional supplementation of subjects in physiologically stressful states, including but not limited to individuals suffering from obesity, hypertension, heart failure, anorexia, alcoholism and other diseases. Claims of the '904 Patent cover Everett's Strovite[®] Advance prescription multivitamin product.

20. At all times prior to and since issuance of the '293 Patent and '904 Patent, Everett has marked its applicable products, including its patented Strovite[®] Advance prescription multivitamin product containing the vitamins and minerals claimed in the patents-in-suit, with "Patent Pending" or the '293 Patent number and '904 Patent number, providing constructive notice to the public and Defendant. See Strovite[®] Advance product packaging attached hereto as Exhibit A.

**DEFENDANT BRECKENRIDGE PHARMACEUTICAL
AND ITS ILLEGAL CONDUCT**

21. Upon information and belief, Breckenridge markets, offers for sale and/or sells in the United States "Nutravance," a lower cost vitamin and mineral supplement that is identical to Everett's Strovite® Advance brand product and which infringes at least one claim of the '293 and '904 Patents. Like Everett's patented Strovite® Advance product, Nutravance is a prescription vitamin and mineral supplement specially formulated therapeutic nutritional supplementation.

22. Everett is informed and believes, and on that basis alleges, that Defendant intentionally copied the formulation of Everett's established patented Strovite® Advance brand product for use in Defendant's lower cost Nutravance product. Indeed, Defendant's Nutravance product contains the exact same vitamins, minerals, and other nutrients, in the exact same amounts, as that contained in Everett's established patented Strovite® Advance brand product.

23. Everett is informed and believes, and on that basis alleges, that Defendant's intentional and illegal conduct was part of a calculated plan to improperly benefit from Everett's efforts and directly, deliberately, and unfairly compete with Everett's established patented Strovite® Advance brand product.

24. Everett is informed and believes, and on that basis alleges, that Defendant has spent relatively little money or resources, if any, developing the Nutravance product formulation, and instead, intentionally copied Everett's proprietary patented Strovite® Advance formulation, for use in direct, deliberate, and unfair competition with Everett's established patented Strovite® Advance brand product.

25. Everett is informed and believes, and on that basis alleges, that because of Defendant's use, advertising, marketing, and offering for sale identical lower cost products of Everett's established patented Strovite® Advance brand product, Everett will suffer damage and losses, including but not limited to irreparable injury to its business reputation and goodwill. Indeed every sale of Defendant's lower cost Nutravance product is a sale lost by Everett of its established patented Strovite® Advance brand product.

THE FLORIDA COMPLAINT

26. Breckenridge filed the Florida Complaint on January 7, 2009, the day before its scheduled mediation with Everett in the Federal Circuit Appeal and the day it began to market and offer for sale its Nutravance product.

27. Prior to obtaining a copy of the already filed Florida Complaint, Everett had no knowledge of the Nutravance product, had not engaged in any communications with Breckenridge concerning the Nutravance product, had not seen or evaluated the Nutravance product and had not taken any steps to restrain or interfere with Breckenridge's right to market the Nutravance product. Accordingly, Everett had no plans or intention, immediate or otherwise, of initiating a lawsuit alleging that Breckenridge's marketing or sale of Nutravance infringed either the '904 Patent or the '293 Patent.

28. At the time Breckenridge filed the Florida Complaint there was no substantial controversy between the parties of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

FIRST CLAIM FOR RELIEF

(Infringement of U.S. Patent No. 6,660,293)

29. The allegations of paragraphs 1-28 above are hereby re-alleged and incorporated herein by reference.

30. Everett is the owner, by assignment, of the '293 Patent. The '293 Patent was duly and legally issued by the PTO on December 9, 2003.

31. Upon information and belief, Defendant has through the conduct described above, engaged in the marketing, sale, and offer for sale of products that infringed and continue to infringe, directly and/or indirectly by contributorily infringing and/or inducing to infringe, one of more of the claims of Everett's '293 Patent, in violation of 35 U.S.C. § 271 and without Everett's authority. The infringing product embodying the claimed invention(s) is Defendant's Nutravance multivitamin product.

32. Everett is informed and believes, and thereon alleges, that Defendant has engaged in the complained of activities with actual knowledge of the '293 Patent.

33. By reason of Defendant's infringement, Everett has suffered and is suffering damages, including impairment of the value of the '293 Patent, in an amount yet to be determined.

34. Defendant's acts of infringement are causing irreparable harm to Everett and will continue to cause irreparable harm unless enjoined by this Court.

35. Defendant's acts of infringement have been committed with notice and knowledge of Everett's patent rights and, upon information and belief, Defendant's infringement has been willful and carried out without exercising due care.

SECOND CLAIM FOR RELIEF

(Infringement of U.S. Patent No. 6,863,904)

36. Everett realleges and incorporates by reference paragraphs 1-35 as if fully set forth herein.

37. Everett is the owner, by assignment, of the '904 Patent. The '904 Patent was duly and legally issued by the PTO on March 8, 2005.

38. Upon information and belief, through the conduct described above, Defendant has engaged in the marketing, sale, and offer for sale of products that infringed and continue to infringe, directly and/or indirectly by contributorily infringing and/or inducing to infringe, one or more of the claims of Everett's '904 Patent, in violation of 35 U.S.C. § 271 and without Everett's authority. The infringing product embodying the claimed invention(s) is Defendant's Nutravance multivitamin product.

39. By reason of Defendant's infringement, Everett has suffered and is suffering damages, including impairment of the value of the '904 Patent, in an amount yet to be determined.

40. Defendant's acts of infringement are causing irreparable harm to Everett and will continue to cause irreparable harm unless enjoined by this Court.

41. Defendant's acts of infringement have been committed with notice and knowledge of Everett's patent rights and, upon information and belief, Defendant's infringement has been willful and carried out without exercising due care.